

***United States Court of Appeals
for the Second Circuit***

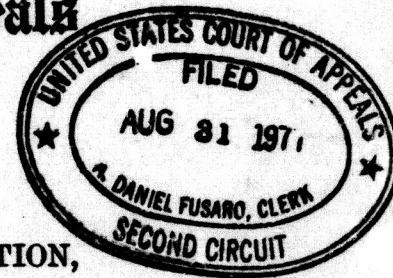


**BRIEF FOR
APPELLANT**

ORIGINAL

76-7412

United States Court of Appeals
For the Second Circuit



SPRAGUE & RHODES COMMODITY CORPORATION,
Petitioner-Appellant,
against

INSTITUTO MEXICANO DEL CAFE,
Respondent-Appellee.

On Appeal from the United States District Court
for the Southern District of New York

**BRIEF FOR
PETITIONER-APPELLANT**

PHILLIPS, NIZER, BENJAMIN, KRIM & BALLON
Attorneys for Petitioner-Appellant
40 West 57th Street
New York, New York 10019
(212) 977-9700

Of Counsel:
LEONARD E. BAUM
GEORGE P. BIENBAUM

B P/S

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 76-7412

SPRAGUE & RHODES COMMODITY CORPORATION,
Petitioner-Appellant,

v.

INSTITUTO MEXICANO DEL CAFE,
Respondent-Appellee

Appeal from the United States District Court
For the Southern District of New York

BRIEF FOR PETITIONER-APPELLANT

ISSUES PRESENTED

1. Did the District Court err in its refusal to conclude, as a matter of law, that the parties had made an agreement to arbitrate?
2. Did the District Court err in denying appellant a trial on the issue of the making of an agreement to arbitrate?

STATEMENT OF THE CASE

A. Preliminary Statement

This is an appeal* from an endorsement order of the United States District Court for the Southern District of New York (Pierce, J.) filed August 17, 1976 (A**238), dismissing appellant's petition to compel arbitration of a commercial dispute pursuant to the Federal Arbitration Act, 9 U.S.C. §4. For the reasons set forth herein, appellant submits that this Court must find, as a matter of law, that the parties had made a valid agreement to arbitrate disputes of the type which have arisen. At the very least, however, Judge Pierce should not have denied appellant a trial on the issue of whether the parties had made an agreement to arbitrate.

B. Statement of the Facts

1. The Parties

Petitioner-appellant Sprague & Rhodes Commodity

*Jurisdiction of the appeal attaches pursuant to 28 U.S.C. §§1291 and 1292 (a)(1).

**Citations followed by an "A" indicate the referenced pages in the joint appendix.

Corporation ("S&R") is a well-established New York concern which is the sixth or seventh largest importer of green coffee in the United States (A17, A225).

S&R imports an average of 800,000 bags of coffee each year from over 35 countries throughout the world, including many thousands of bags from governmental and private sources in Mexico (A14, A17, A225). Although S&R has no office in Mexico, it is quite familiar with prevailing trade custom and procedures in the Mexican coffee trade (A17, A225-226).

Respondent-appellee Instituto Mexicano Del Cafe ("Instituto") is the governmental agency created by the Republic of Mexico to regulate the quantity of coffee exported from Mexico as well as the minimum export price (A105-106). Instituto also operates as a private commercial enterprise which sells coffee for its own account (A105). In this capacity, it is Mexico's largest coffee exporter, selling directly to United States importers such as S&R. It also sells to Mexican companies who may re-sell the coffee (A107). Instituto maintains a New York City office at which two senior officials are located (A69).

2. The Green Coffee Association Contract
And its Arbitration Provision

S&R is a member of the Green Coffee Association of New York, Inc. ("Green Coffee Association") a trade association numbering among its 108 members and 70 associate members the leading United States coffee importers as well as insurance companies, banks and shippers (A17). Many of the Green Coffee Association's members import coffee from Mexico (A17-18).

Green Coffee Association members uniformly employ a standard form contract ("Green Coffee Association Contract") (A17, A66, A226), which contains an arbitration provision as broad as any which the courts have construed. This provision states:

"All controversies relating to, in connection with, or arising out of this contract, its modification, making or the authority or obligations of the signatories hereto, and whether involving the principals, agents, brokers, or others who actually subscribe hereto, shall be settled by arbitration in accordance with the 'Rules of Arbitration' of the Green Coffee Association of New York City, Inc., as they exist at the time of the arbitration (including provisions as to payment of fees and expenses). Arbitration is the sole remedy hereunder, and it shall be held in accordance with the law of New York State, and judgment of any award may be entered in the courts of that State, or in

any other court of competent jurisdiction. All notices or judicial service in reference to arbitration or enforcement shall be deemed given if transmitted as required by the afore-said rules" (emphasis supplied) (A66).

3. The Underlying Dispute Between the Parties

The underlying commercial dispute herein arose out of S&R's purchase of 6,000 bags of green coffee in July and August of 1975. It is not disputed that S&R received and paid for all 6,000 bags. The dispute concerns whether payment was made to the proper party.

S&R authorized contracts covering these purchases from three different sources: (1) 2,000 bags from Manuel Penagos Lara ("Penagos"); (2) 1,000 bags from Instituto; and (3) 3,000 bags from Cafes De La Frontera ("Frontera"). When it received the 6,000 bags, S&R paid the full purchase price specified by the three contracts, a total of \$614,525 (A22, A24-25). Some time after payment was made, Instituto claimed that it alone had supplied all of the coffee which had been delivered to S&R. Instituto received and retained \$120,933 (S&R's payment for the 1,000 bags believed to be purchased from Instituto), but claimed that it was entitled to an additional \$606,948 for the balance of 5,000 bags (A14).

S&R has never maintained an office in Mexico (A17). Thus, to make these purchases S&R dealt through an independent agent who resided in Mexico, M. Armando Guzman Villaneuva ("Guzman"). In addition, Guzman also sold coffee for his own account (A14).

Typically an agent (Guzman) locates coffee available for export from Mexico and contacts the United States importer (S&R) to determine whether there is interest in purchasing the coffee. If so, the deal is negotiated with the agent by telephone and telex (A19-20). In each such instance, S&R confirms the transaction by telex from New York, referring to the formal written contract to follow containing the terms of the purchase. Without exception S&R's formal contract is the Green Coffee Association Contract containing the arbitration provision quoted above, and is immediately sent to the agent for transmittal to the seller (A5, A226).

From S&R's perspective, the sequence of events was as follows:

On July 15, 1975, S&R agreed to purchase 2,000 bags of green coffee from a Mexican coffee producer named Penagos. S&R sent Guzman a standard Green Coffee Association Contract for transmittal to Penagos which specified a purchase price of \$153,638 (A22, A72-73).

On July 17, 1975, a frost in Brazil caused the price of coffee to soar. Instituto thereupon promulgated certain changes in Mexican coffee export regulations. It increased the minimum export price of coffee and temporarily limited exports to the United States (A23).

Guzman reported these developments to S&R by telex on July 31, 1975 (A23). In this telex, Guzman also requested that S&R send him a number of so-called "registration" contracts for the purpose of assuring S&R's ability to export its full coffee requirements within the quota set by Instituto (A23). Guzman also suggested the text of a telex to be sent to Instituto by S&R to confirm that Guzman was S&R's representative and that S&R was sending a "registration" contract for 3,000 bags.

S&R sent such a telex on July 31, 1975. This telex, which is of critical importance in the dispute, stated:

"This is to confirm that Armando Guzman is our representative in Mexico and is also authorized to pass offers at our name when instructed by us. We are also sending contract 5437-F covering 3,000 bags Mex/OW at 80.00 dls fob Laredo. The complete details should be given by our representative and on the contract" (emphasis supplied) (A24).

On the very same day, S&R sent Contract No. 5437-F, the contract referred to in the telex, to Guzman with a letter which stated, "It is understood that these contracts are for registration purposes" (A12).

On August 6, 1976, S&R instructed Guzman to purchase 1,000 bags of green coffee from Instituto for \$127,933. S&R immediately confirmed this transaction by sending Green Coffee Association Contract 5481 to Guzman for delivery to Instituto (A12-13, A76-77). This contract also contained the standard arbitration provision, as did every other contract involved herein.

In mid-August 1975, S&R purchased an additional 3,000 bags from Frontera, a company owned by Guzman, and confirmed the transaction with two Green Coffee Association Contracts (A13, A78-81).

In summary, between July and August S&R had agreed to purchase 2,000 bags of coffee from Penagos, 1,000 bags from Instituto and 3,000 bags from Frontera. S&R promptly confirmed all three purchases on Green Coffee Association Contracts requiring arbitration of any dispute.

On August 20, 1975, 6,000 bags were cleared through customs at the Mexican border and placed in a warehouse in Laredo, Texas (A13). After confirming the coffee's arrival, on August 22, 1975, S&R paid \$153,638 to Penagos and \$120,933 to Instituto (A13). On August 26, 1975, S&R paid \$339,954 to Frontera (A14).

Several weeks later Instituto claimed \$606,948 from S&R, alleging it to be the balance due on 6,000 bags sold and delivered by Instituto. Instituto alleged a total sales price of \$727,881 and credited S&R for \$120,933 which it had received from S&R in payment for the 1,000 bags ordered on August 6 (A14). S&R rejected Instituto's claim because all of the appropriate sellers of the 6,000 bags already had been paid in full (A15). Moreover, it subsequently appeared from numerous documents and statements by Guzman that Guzman himself paid Instituto for all or a large part of the amount claimed as due from S&R (A29-31, A83). Although Instituto initially issued receipts so indicating (A231-232), it now claims that these payments were applied to discharge Guzman's separate, personal debt to Instituto (A115-117).

4. Instituto's Version of the Disputed Transaction

In the months of negotiation and litigation which

followed,* Instituto set forth its position in affidavits and exhibits submitted to the District Court (A102 et seq.)

Instituto claims that on July 29, 1975, Guzman, representing himself as S&R's agent, ordered 3,000 bags of coffee from Instituto. According to the affidavit of Instituto's "house counsel," Hector Garza Rodriguez, Instituto insisted upon "immediate written confirmation" from S&R (A109). Guzman promised that the order would be confirmed both by a contract and a telex. In this regard, Instituto points to a letter it allegedly received from Guzman specifically stating that S&R's order "shall be confirmed by the Purchase Agreement which is to be remitted by the buyer and shall also be confirmed by telex" (emphasis supplied) (A109, A139).

Instituto claims that its expectations were fulfilled by receipt of S&R's July 31 telex, which states:

*In September, 1976, as a result of many months of negotiations, including face-to-face negotiations in New York City, both before and after Judge Pierce's dismissal of appellant's petition on August 17, 1976, it appeared that a compromise had been reached. A written settlement agreement was prepared by New York counsel for both parties in October of 1976. After months of further communications, in July of 1977, Instituto refused to execute the agreement, thereby necessitating the revival of this appeal.

"We are also sending contract 5437-F covering 3,000 bags ... the complete details should be given by our representative and on the contract" (emphasis supplied) (A109, A137).

S&R dispatched the contract referred to in the telex, No. 5437-F, to Guzman (A24). Instituto denies receiving this contract although it relied on it to ship 3,000 bags of coffee without making any effort to ascertain its terms (A109)*.

According to Instituto, on August 12, 1975, Guzman placed a second 3,000 bag order on behalf of S&R (A110). As before, Guzman represented that S&R would send a written contract for the second 3,000 bag purchase (A155). Instituto repeatedly has stated that it accepted this offer from Guzman on the strength of the July 31 telex and that all 6,000 bags were shipped together as part of a single transaction (A109-110). Instituto has explained that it shipped all 6,000 bags to S&R, thereby accepting S&R's offer, before it received the confirming contracts referred to by Guzman and S&R's

*This denial by affidavit is unconvincing in light of Instituto's close relationship with Guzman (A116, A182-196). The question of receipt can only be resolved by a trial.

telex because confirming contracts arrive days or even weeks after a sale is agreed upon (A106-107).

5. Instituto's Claim for Breach of Contract
And its Affirmance of Arbitration

On March 23, 1976, Instituto commenced a breach of contract action against S&R and Guzman in the Superior Court in Mexico (the "Mexican action") (A151-171). In defining the contract, Instituto's complaint (paragraphs II-V, A153-155) explicitly relies on three items: (1) Guzman's representations of July 29, 1975, which assured Instituto that a telex and a written contract would be sent by S&R confirming the purchase of 3,000 bags*; (2) S&R's telex to Instituto dated July 31, 1975, which read in part:

" ... We are also sending contract
5437-F covering 3,000 bags Mex/OW at
80.00 d11s fob Laredo. The complete de-

*Indeed, Guzman's letter to Instituto dated July 29 concluded with the statement: "The above shall be confirmed by the Purchase Agreement which is to be remitted by the buyer and shall also be confirmed by telex" (emphasis supplied) (A137), which makes it clear that the purchase agreement and the telex would be separate documents.

tails should be given by our representative and on the contract" (emphasis supplied) (A137);

and (3) two contracts (including Green Coffee Association Contract 5437-F) to follow which Instituto states it has "not received to date" (A155).

Thus, Instituto's complaint makes it clear that the agreement which S&R allegedly breached integrated Guzman's oral offer, the telex and two formal contracts, including 5437-F, which were to follow containing the detailed terms*.

It is undisputed that S&R sent Guzman Green Coffee Association Contract 5437-F, the contract referred to in both the letter and the telex, and that S&R sent Guzman contract 5481 for 1,000 bags to be purchased from Instituto (A112)**. Even assuming, arguendo, that Instituto did not receive these contracts, Instituto is bound to arbitration because it anticipated receiving and being bound by the Green

*The July 29 letter and the July 31 telex, with their references to a formal purchase contract to follow, are also explicitly relied upon as the basis of the alleged purchase agreement by Instituto's "house counsel", Mr. Garza, in his affidavit in opposition to S&R's petition (A109).

**Copies of these contracts were submitted to the District Court (A74-77), and both contracts contain the broad standard arbitration provision quoted at pages 4-5, supra.

Coffee Association Contract and its arbitration provision. This is evident from the parties' previous course of dealing as well as trade usage.

6. The Parties' Course of Dealing as Well as Trade Usage Mandates Settlement of Disputes by Arbitration

In 1970 and 1971 S&R was party to at least eight transactions in which it purchased coffee from Instituto (then known as Beneficios Mexicano De Cafe) (A21-22). In each instance, the parties used a Green Coffee Association Contract containing the extremely broad arbitration provision previously quoted (A22, A70). These contracts contained various additional provisions specifying packaging; risk of loss; payment of duties and taxes; guarantees; force majeure; a time limitation and procedure for claims; insolvency and limitation of damages (A70). These same provisions appeared on all subsequent Green Coffee Association Contracts employed by S&R (A72-79). Instituto admits that it "routinely" receives this same contract, with the same provisions, from other coffee importers (A127).

Between 1972 and 1975, S&R imported 37,000 bags of green coffee from approximately 30 different Mexican vendors

pursuant to some 50 separate Green Coffee Association Contracts (A225). Instituto states that it issues "certificates of origin" and export licenses for each and every bag of coffee exported from Mexico (A105-106, A225). It was aware of (indeed it physically stamped) each and every one of S&R's 50 separate Green Coffee Association Contracts (A225).

Moreover, although the parties each disclaim any blame for the loss, the record reveals little dispute over "trade usage" in the registration and confirmation of export contracts from Mexico.

Instituto says that in recent years it has exported millions of bags of coffee worth hundreds of millions of dollars (A105). According to Mr. Garza's affidavit:

"Slightly more than half of Mexican coffee exports is to buyers in the United States; and it is true, as the Floom affidavit alleges, that the bulk of these sales are to members of the Green Association of New York, Inc. ("GCA"), who usually (but by no means always) confirm their sales transactions by sending the standard GCA contract" (emphasis supplied) (A106-107).

The affidavit of Eduardo Gonzales, Instituto's sales manager, confirms the consistent use of Green Coffee Association Contracts:

"GCA contracts are of course routinely sent by GCA members who buy from Instituto, in confirmation of sales transactions" (emphasis supplied) (A127).

Elsewhere Mr. Garza confirms that Green Coffee Association members "contract with Instituto for the purchase of hundreds of thousands of bags of coffee each year" (A117) and refers to the "standard GCA Contracts which [S&R's] more knowledgeable competitors submit to [Instituto] from time to time" (A113).

Although Instituto contends that, due to the speed of the international coffee trade, Green Coffee Association Contracts often reach Instituto after the coffee has been shipped, Instituto has never alluded to a single instance in which it rejected such a contract or challenged any term of the contract, including the arbitration provision. It is obvious why Instituto so willingly ships coffee before receiving the contract: it anticipates receiving the standard Green Coffee Association Contract, knows its terms and is willing to be bound to them.

7. The Opinion Below

On July 19, 1976, S&R filed its petition to compel arbitration pursuant to Section 4 of the Federal Arbitration Act, 9 U.S.C. §4 (the "Act") (A1-5)*. Instituto answered and, while admitting that it had made a contract for the sale of coffee to S&R, denied that the parties had agreed to arbitrate disputes arising under the contract (A6-10).

Despite the Act's explicit instruction that, "if the making of the arbitration agreement ... be in issue, the

*9 U.S.C. §4 provides, in salient part, that:

"A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28 in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement ... The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement ... If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof."

court shall proceed summarily to the trial thereof," Judge Pierce considered only the parties' affidavits and oral argument before dismissing S&R's petition on the ground "that petitioner has failed to carry its threshold burden of demonstrating the existence of a written agreement between the parties which contains an arbitration provision" (A238).

For the reasons set forth below, appellant submits that, as a matter of law, the requisite arbitration agreement between the parties does exist and arbitration must be compelled. At the very least Judge Pierce's decision must be reversed and the case remanded to the District Court for trial.

ARGUMENT

POINT I

The District Court Erred in Its
Conclusion That There Was No
Written Agreement to Arbitrate

Judge Pierce's opinion indicates that he improperly dismissed S&R's petition because it pleaded in the alternative (A238). The petition stated that S&R had made no agreement to purchase 6,000 bags from Instituto (because Guzman lacked the requisite authority), but, since Instituto claimed such an agreement did exist, the agreement relied on by Instituto required arbitration of the parties' dispute (A3). Judge Pierce perceived S&R's denial of Guzman's authority to be a denial of any basis under contract law for finding an agreement to arbitrate. He apparently also perceived a requirement under the Federal Arbitration Act that a single integrated document containing an arbitration provision must be delivered to the party to be charged. On both points the law in this Circuit is well established to the contrary. In the instant case all of the prerequisites to arbitration have been met.

A. Instituto Agreed To Be Bound
 By a Written Arbitration
 Provision

The Federal Arbitration Act does not require that an agreement to arbitrate be contained in a single, integrated document delivered to and executed by the party to be charged with arbitration. Medical Development Corp. v. Industrial Moulding Corp., 479 F.2d 345, 348 (10th Cir. 1973); Fisser v. International Bank, 282 F.2d 231, 233 (2d Cir. 1960); Joseph Muller Corp. Zurich v. Commonwealth Petrochemicals, 334 F. Supp. 1013 (S.D.N.Y. 1971); Universal Oil Products Co. v. SCM Corp., 313 F. Supp. 905 (D. Conn. 1970).

In Joseph Muller, 334 F. Supp. at 1020, it was held that the Federal Arbitration Act is satisfied if there is a "written provision for arbitration coupled with a contract between the parties, albeit a unilateral contract or one arising from correspondence." The court declined to read into the statute a requirement for a single, integrated contract because it

"would have the effect either of eliminating as a practical matter arbitration provisions from numerous contracts which are entered into daily or of upsetting routine and ordinary business prac-

tices whereby contracts are made by accepting purchase orders, by brokers' notes, by performance, or even by silent assent. These conditions apply generally to the field of contracts and, although some problems arise, they are not of sufficient weight to urge a different disposition of contracts to arbitrate" (emphasis supplied) Id. at 1021.

Similarly, in Fisser v. International Bank, 282

F.2d at 233, this Court declared that the Federal Arbitration Act

"[C]ontains no built-in Statute of Frauds provision but merely requires that the arbitration provision itself be in writing. Ordinary contract principles determine who is bound by such written provisions and of course parties can become contractually bound absent their signatures. It is not surprising then to find a long series of decisions which recognize that the variety of ways in which a party may become bound by a written arbitration provision is limited only by generally operative principles of contract law" (emphasis supplied).

Thus, the Act is satisfied if there is a written arbitration provision and the parties have by word or deed evidenced an intent to be bound to it. Accordingly, this Court must look to principles of contract law to determine whether here there was an offer and acceptance sufficient to bind the parties to a written arbitration provision.

Instituto argues that it never agreed to an arbitration provision because it never received any of the Green Coffee Association Contracts sent by S&R -- neither the contract for 1,000 bags sent on August 6, 1975 nor "registration" contract 5437-F referred to in S&R's July 31 telex.

Since Instituto has affirmed some "offer" by S&R by suing for breach of contract, it is necessary to ascertain the terms of the offer which Instituto accepted by shipping 6,000 bags. When Guzman made his oral offer to buy 3,000 bags on July 29 Instituto required immediate written confirmation from S&R (A109). Accordingly, S&R sent its July 31 telex referring to Contract 5437-F and stating that complete details were "on the contract"*.

Thus, as stated by Instituto's complaint in its Mexican action, the offer on which Instituto explicitly relied in shipping 6,000 bags of coffee consisted of Guzman's repre-

*This telex reference to a written contract confirmed Guzman's July 29 letter to Instituto stating that the purchase "shall be confirmed by the Purchase Agreement which is to be remitted by the buyer and shall also be confirmed by telex" (emphasis supplied). This language makes it clear that the Purchase Agreement would be a separate document from the confirming telex of July 31.

sentations, S&R's July 31 telex and the contract referred to both by Guzman and in the telex (A153-156). Instituto accepted this offer by performance -- it shipped the coffee. See U.C.C. §2-206(1)(b) (acceptance of offer by performance); John Tallon & Co. v. M & N Meat Co., 396 F. Supp. 1239, 1243 (E.D.N.Y. 1975); Joseph Muller, 334 F. Supp. at 1019.

It is hornbook contract law that one document can incorporate the terms of another document by reference and that a party who assents to the terms of the first document also agrees to the terms of the referenced document; they are to be read together as a single document. Colden v. Asmus, 322 F. Supp. 1163, 1165 (S.D. Cal. 1971) (Navy enlisted man held to terms of referenced description of training program although no indication that he received or was aware of its terms); United Rubber C., L., & P.W., Local 102 v. Lee Rubber & Tire Corp., 269 F. Supp. 708, 715 (D.N.J. 1967) (court enforced arbitration pursuant to a referenced but unattached separate agreement); Lowry & Co. v. S. S. LeMoyne D'Iberville, 253 F. Supp. 396, 397 (S.D.N.Y. 1966) (Veinfield, J.) (incorporating arbitration clause by reference);

United States v. Essential Construction Co., 261 F. Supp. 715, 717, 718 (D. Md. 1966) (provisions of a principal construction contract incorporated in a subcontract by reference without any finding that the principal contract was delivered to the party being charged); United States Fidelity & Guaranty Company v. Long, 214 F. Supp. 307, 314 (D. Ore. 1963); Jones v. Cunard S.S. Co., 238 App. Div. 172, 173, 263 N.Y.S. 769, 771 (2nd Dep't 1933) (incorporating by reference the Hague Rules 1921 imposing a twelve month limitation on actions); Raphael v. Hilett Motor Car Co., 188 N.Y.S. 209, 210 (1st Dep't 1921); 4 Williston, Contracts §628 (3rd ed. 1961).

An arbitration provision in a separate document may be incorporated by reference. As stated by Judge Weinfeld in Lowrey & Co., 253 F. Supp. at 398:

" ... It is not necessary, in order to incorporate by reference the terms of another document, that such purpose be stated in haec verba or that any particular language be used. '[A]rbitration clauses are to be treated like any other contract provisions,' and it is settled doctrine that a reference in a contract

to another writing, sufficiently described, incorporates that writing" (footnotes omitted).

It is not necessary that the referenced document be physically attached to the document referring to it; the two are still interpreted as part of a single agreement. American Federation of Labor v. Western Union Telegraph Co., 179 F.2d 535, 538 (6th Cir. 1950); 4 Williston, Contracts §581 (3rd ed. 1961). Nor is it necessary that the referenced document be delivered to or be in the possession of the party to be charged so long as its terms are available to the court. See Colden v. Asmus; United Rubber C., L., & P.W., Local 102; Lowrey & Co., 259 F. Supp. at 397; Jones v. Cunard S.S. Co.

In the instant case, S&R's telex of July 31 and Guzman's letter of July 29, the documents on which Instituto claims to have relied, both incorporated by reference the terms of Green Coffee Association Contract 5437-F, including the arbitration provision. Instituto's claim that it never

received this contract is irrelevant.* Instituto knew about the contract; the record is barren of any indication that it made the slightest effort to obtain a copy or ascertain the terms.**

A party which knowingly binds itself to a contract but does not take the trouble to investigate the contract's terms is held to those terms, including arbitration. N & D Fashions v. DHJ Industries, 548 F.2d 772, 727 (8th Cir. 1977); Southeastern Enameling Corporation v. General Bronze Corporation, 434 F.2d 330, 332-334 (5th Cir. 1970); Cornell & Company v. Barber & Ross Company, 242 F. Supp. 825, 826 (D.D.C. 1965), aff'd, 360 F.2d 512 (D.C. Cir. 1966); Gaskin v. Stumm Handel GmbH, 390 F. Supp. 361, 366 (S.D.N.Y. 1975); Humble Oil & Refining Company v. Jaybert Esso Service Station, 30 App. Div. 2d 952, 294 N.Y.S. 2d 190, 192 (1st Dep't 1968); Raphael v. Hulett Motor Car Co.

*The entire argument of this Point is based solely on Instituto's version of the facts. If it is necessary to resolve the factual question as to whether Instituto did receive the contract, Point II, infra, demonstrates that the Federal Arbitration Act mandates a trial.

**As stated in part C of this point, infra, the reason Instituto made no effort to learn the terms was because it expected a Green Coffee Association Contract and already knew the terms.

In Raphael v. Hulett Motor Car Co., 188 N.Y.S. at 210, the Court held that a party was bound to terms in a referenced document with which it claimed unfamiliarity:

"It seems to me to be clear that the sale and its terms were expressed in a written instrument which by adequate reference embodied another instrument, to wit, the regular used Chandler guaranty. Matter of Board of Com'rs of Washington Park, 52 N. Y. 131, 134. Both parties must be deemed to have acquiesced in the incorporation of the second instrument into the first whether either of them was familiar with its terms or not" (emphasis supplied).

The rule is the same with respect to arbitration provisions. In Southeastern Enameling Corp. v. General Bronze Corp., General Bronze sent Southeastern a letter and a telegram, both of which referred to an "order SC 3939" to follow. Even though an officer of Southeastern testified that he had not understood the abbreviation, the Court found that Southeastern had bound itself to the arbitration provision contained in the referenced purchase order:

"It is admitted by both sides that no question of fraud is presented. And in its absence where contracts contain extraneous references of fact and to other documents, the same enters therein to the extent that it is pertinent, and the parties are bound thereby. And he

who omits to inform himself as to such fact or contents and extent of such other writing referred to, in so far as it is reasonable and in contemplation of parties to contract is bound thereby.'" 434 F.2d at 334.

The reference to the terms of another document is far more clear in the case at bar than the obscure reference "order SC 3939" in Southeastern. S&R's July 31 telex identified a specific Contract No. 5437-F and stated that the "complete details ... should be given on the contract". If indeed Instituto failed to obtain a copy of the contract, it did so at its peril.

Judge Pierce's opinion cites only one case, Medical Development Corp. v. Industrial Moulding Corp., in support of his conclusion that because Instituto denied delivery, receipt and execution of a written arbitration provision, there was no agreement to arbitrate. That case simply does not support any of the propositions for which it is offered. To the contrary, Medical Development actually supports S&R's position that Instituto is bound to the terms of Contract 5437-F, incorporated by reference, because in similar circumstances a "prudent man" would not have shipped without first investigating the "complete details ... on the contract."

First, Medical Development explicitly states that the written arbitration provision contemplated by the Federal Arbitration Act does not need to be executed by the party to be charged. Id. at 348.

Next, Medical Development deals with two separate transactions for which arbitration was demanded. The "first" transaction was similar to the case at bar. Defendant had agreed to construct certain molds for plaintiff pursuant to an agreement containing an arbitration clause. Some seven months later, pursuant to an oral price quotation, defendant agreed to manufacture similar molds and told plaintiff that its oral quotation would be confirmed in writing on the "usual quotation form". Defendant sent a confirming contract containing an arbitration clause which plaintiff did not bother to read. The district court refused arbitration on this transaction because of plaintiff's "lack of awareness of the arbitration clause." 479 F.2d at 348. The court of appeals reversed. Referring to the fact that the parties had engaged in a similar transaction using a similar contract in the past, and noting the incorporation by reference of the "usual

quotation form", the court ordered further consideration of whether, as a "prudent man," plaintiff should have been aware of the arbitration procedure*.

The second transaction in Medical Development, which apparently is the one relied on by Judge Pierce, is inapposite. In that transaction defendant had agreed to make a different product than before (parts, not molds) and sent plaintiff a contract specifying that "for all other terms and conditions reference [is] made to Quotation Q182-70 'a copy of which is attached'". 479 F.2d at 349. In reality only the front side of Q182-70, a two-sided document, was photocopied and annexed to the contract. The arbitration provision appeared on the missing reverse side. With regard to this transaction, the court of appeals affirmed the district court's finding, after trial, that defendant had "created an ambiguity" by only supplying part of the referenced document and excluding the arbitration clause. The

*Judge Pierce denied S&R the opportunity of even one trial at which it could show that Instituto should have been aware of the arbitration provision. In Medical Development, which reached the court of appeals after trial, the case was remanded for further consideration.

court construed the ambiguity against defendant by denying arbitration.

In the instant case no such ambiguity was created. Instituto was not given only part of a referenced document. Instituto was never led to believe that it possessed all the terms of the agreement. According to its own story, Instituto was alerted to the contract by S&R's July 31 telex but made no effort to obtain a copy.

Finally, Medical Development does not hold that the Federal Arbitration Act requires delivery or receipt of the piece of paper containing the written arbitration provision; the court's willingness to consider the incorporation by reference of terms in other documents suggests the exact opposite.

Instituto shipped 6,000 bags of coffee in reliance on a telex and a letter which both referred to a written contract containing other terms. To see that Instituto should not now be permitted to deny the applicability of the arbitration provision in Contract 5437-F, it is only necessary to ask three rhetorical questions:

1. If the shipment had been lost by reason of an act of war, would Instituto waive the contract's requirement that the buyer bear the risk of such insurance?

2. If a "strike" or unavoidable "interruption of transportation" had prevented Instituto from delivering, would Instituto waive its rights under the Force Majeure clause?

3. If Instituto had failed to deliver for some other reason, would it waive the contract's preclusion of consequential damages?

The answer to these questions is obviously "no".
A fortiori Instituto should not be allowed to escape arbitration.

B. Instituto Affirmed the Arbitration Provision
By Claiming the Existence of an Agreement

In the opinion below it is obvious that Instituto confused the District Court with a seeming paradox: how can S&R claim that there was an agreement to arbitrate when it claims that there was no agreement between the parties for the sale of 6,000 bags of coffee?

The answer is simple. S&R was clearly allowed to plead, in the alternative, that the alleged agreement to buy

6,000 bags from Instituto was invalid (because Guzman lacked the requisite authority) but that if, as Instituto claims, there was an agreement, that agreement included a provision requiring arbitration. Fed. R. Civ. P. 8(e)(2) (pleading in the alternative permissible); General Guaranty Insurance Company v. New Orleans General Agency, 427 F.2d 924, 929 (5th Cir. 1970); Mogge v. District No. 8, International Ass'n of Machinists, 387 F.2d 880, 883 (7th Cir. 1968); Genesco v. Joint Council 13, United Shoe Workers, 341 F.2d 482, 484 (2nd Cir. 1965).

In General Guaranty Insurance Co., the court emphatically rejected the argument that a party seeking arbitration dare not plead the invalidity of the underlying agreement:

"NOGA did not lose its rights to arbitration by pleading alternatively that the contract had been abandoned and that court proceedings should be stayed pending arbitration. The propriety and desirability of having an initial judicial determination of whether an arbitration contract exists is well recognized [citations omitted] ... While never put so boldly, GIC's implicit position is this: because the issue of abandonment would determine not only the existence of an

arbitration agreement but also effectually determine a defense of NOGA and the indemnitors on the merits, NOGA had to make an election -- it could admit the contract was in effect and call for arbitration, or deny the viability of the contract and defend in court. No such election was required ... it loses sight of the purposes and effects of arbitration, and of the desirability of the initial judicial determination to treat the court proceedings as a sort of judicial tightrope which the party seeking arbitration walks at his peril" (footnotes omitted). 427 F.2d at 928-929.

The same approach was adopted by this Court in

Genesco, 341 F.2d at 484:

"Since the contract pleaded by the employer had an arbitration clause, the union was entitled to raise the question whether an action was not barred by its very terms, while reserving the right to deny the existence of the contract if the court decided adversely ..."

For the purposes of the instant petition, S&R can adopt the position that if an agreement between the parties does exist (as Instituto claims), the agreement provides for arbitration. Under the Federal Arbitration Act, the only determination to be made by the District Court (indeed, the determination which must be made by the District Court) is: was there an agreement between the parties which included a

written arbitration provision. Kulukundis Shipping Co. v. Amtorg Trading Corporation, 126 F.2d 978, 986 (2nd Cir. 1942). If the Court makes an affirmative determination on this issue, the arbitrators determine the remaining issues: the terms of the agreement (was there an agreement for 1,000 bags or 6,000 bags); payment; damages; and the scope of authority of the parties' agents.*

Thus, it is an accepted legal principle that S&R may contest the existence of any agreement while admitting its existence for the purpose of urging that any disputes about the underlying transaction must be resolved by arbitration. The real paradox, which the District Court overlooked, is that Instituto, which contends that an agreement exists (and is suing on it) also contends that an obvious term of that agreement -- arbitration -- doesn't exist. In Kulukundis, 126 F.2d at 988, this Court rejected such a ploy, citing with approval Professor Williston:

*The broad language of the Green Coffee Association Contract arbitration provision specifically covers the issue of agents' authority.

"A person who repudiates a contract wrongfully cannot sue upon it himself, but if he is sued upon it, he can be held liable only according to the terms of the contract. If, therefore, an arbitration clause amounts to a condition precedent to the defendant's promise to pay any insurance money, and such conditions are lawful, the defendant can be held liable only if that condition is performed, prevented or waived." 6 Williston, Contracts §1921 (rev. ed. 1938); 16 Williston, Contracts §1918 (3rd ed. 1976).

Moreover, since arbitration is a term of the agreement sued upon by Instituto (as demonstrated in part A of this Point, supra), the submission of the dispute to arbitration is a condition precedent to any right of legal action by Instituto. Kulukundis, 126 F.2d at 988; Southeastern Enameling Co., 434 F.2d at 330, 333-334.

Instituto, as the party claiming under an alleged agreement, cannot adopt part of the agreement while rejecting those provisions, such as arbitration, it does not care for. By contrast, S&R may ask the District Court to determine whether the parties made an agreement providing for arbitration without waiving its defenses to Instituto's claims.

C. The Existing Agreement may be Supplemented by Trade Usage and the Parties' Course of Dealing

Since the District Court misunderstood the nature of the agreement between the parties, it erroneously refused to consider the usage of the coffee trade and the parties' previous course of dealing, both of which are clearly set forth in the various affidavits submitted below.

Uniform Commercial Code §1-205(2) defines a "usage of trade" as

"any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts" (emphasis supplied).

Instituto's own affidavits demonstrate a routine usage of trade in the export of green coffee from Mexico to the United States -- the employment of Green Coffee Association Contracts requiring arbitration. The regularity with which these contracts were used justified expectation that such a contract would be used and its arbitration provision would be observed with respect to Instituto's transaction with S&R.

Uniform Commercial Code §1-205(1) defines a "course of dealing" as

"a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct."

Instituto's eight Green Coffee Association Contracts with S&R in 1970 and 1971, as well as Instituto's approval of every one of S&R's 50 Green Coffee Association Contracts with other Mexican vendors from 1972 through 1975, constituted a "sequence of previous conduct" which is "fairly to be regarded as establishing a common basis of understanding for interpreting [the parties] conduct." U.C.C. §1-205 (1).

Uniform Commercial Code §1-205(3) specifically states that both the parties' course of dealing and any usage of trade "give particular meaning to and supplement or qualify terms of [an] agreement." The agreement at bar receives meaning from the parties' previous dealings as well as trade usage. They demonstrate (if there can be any doubt) that the parties intended the agreement to include the arbitration provision

contained on Green Coffee Association Contract 5437-F,
the contract referred to in S&R's telex of July 31, 1975.

If this Court does not order arbitration as a matter of law, S&R is entitled to a trial on the issue of whether the parties made an agreement to arbitrate. This is discussed in Point II, infra. At such trial S&R would prove this course of dealing and trade usage. This proof would serve to demonstrate that Instituto knew or should have known it was binding itself to the Green Coffee Association Contract referred to in the telex.

POINT II

The District Court Erred In Denying Appellant a Trial On The Issue of the Making of an Agreement to Arbitrate

If the District Court was unwilling to order arbitration as a matter of law, it was required to hold a trial to determine whether the parties had made an agreement to arbitrate their dispute.

Section 4 of the Federal Arbitration Act specifically states that:

"If the making of the arbitration agreement or the failure, neglect or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof."

The language of the Act indicates that a trial is mandatory, not permissive, if the arbitration agreement is disputed. This Court has repeatedly stressed the necessity of a trial. In Interocean Shipping Co. v. National Shipping and Trading Corp., 462 F.2d 673, 678 (2d Cir. 1972), the Court stated that where there are issues of fact:

"These issues should not be determined on affidavits, but rather a full trial should be had."

Similarly, in A/S Custodia v. Lessin International 503 F.2d 318, 319 (2d Cir. 1974), this Court reversed an order denying arbitration where, as here, the District Court had only considered affidavits and briefs and had failed to hold an evidentiary hearing. Accord, El Hoss Engineering & Transport Co. v. American Independent Oil Co., 289 F.2d 346, 351 (2d Cir.1961), cert. denied, 368 U.S. 837 (1961) (issues of fact should not be determined on affidavits but by a full trial).

The District Court misapplied Ocean Industries v. Soros Associates International, 328 F. Supp. 944 (S.D.N.Y. 1971), and erroneously concluded that S&R "failed to make the required threshold showing that an arbitration agreement exists between the parties" (A239), thereby obviating the need for a hearing.

In Ocean Industries defendant engineers had proposed that they would prepare a "preliminary engineering report" and "if the project eventually proceeds onto the final design and construction phase" then engineering services "would be performed in accordance with the 'Standard Form of Agreement' enclosed." 328 F. Supp. at 946. The "Standard

Form" contained an arbitration provision. It was not disputed that plaintiffs had sent a written rejection of the quoted proposal and authorized only the preliminary engineering report. While recognizing that an agreement to arbitrate may be made in as many different ways as any contract, the court concluded that neither party had assented to the "Standard Form" contract in any way; that it "was nothing more than a referent for determining the scope of possible future engineering services"; and that the parties agreed to look to the "Standard Form" only upon the happening of a contingency -- retention of the engineers to perform future services -- which did not eventuate. 328 F. Supp. at 947. In essence the court granted summary judgment because the engineers had not alleged any facts which, if established at trial, could create mutual assent to arbitration.

Here there is but one offer ascribed to S&R by Instituto -- the offer contained in Guzman's July 29 letter, S&R's July 31 telex, and Green Coffee Association Contract No. 5437-F referred to therein. Instituto never rejected this offer - or any part of the offer -- thereby raising the following factual issues:

1. Do the circumstances of Guzman's contacts with Instituto, coupled with S&R's telex of July 31, 1975, constitute an "offer" legally enforceable upon S&R?

2. If S&R is deemed to have made an offer to purchase coffee from Instituto, do the terms of the offer include an agreement to arbitrate? S&R would demonstrate that the answer to this question is "yes" by establishing that Instituto was or should have been aware of the arbitration provision; a reasonably prudent seller would have investigated the terms of the contract referred to in the telex; Instituto anticipated that the referenced contract contained an arbitration provision because of the usage of the trade and the parties' previous course of dealing.

3. Did Instituto ever receive S&R's Green Coffee Association Contract 5481 dated August 6, 1975 for 1,000 bags?

4. Did Instituto ever receive S&R's Green Coffee Association Contract 5437-F for 3,000 bags? Did Instituto ever request this contract from Guzman or discuss its terms with him?

These questions cannot be determined upon affidavits. A full trial must be had.

POINT III

The District Court Erred By Giving any Weight to the Existence of a Mexican Action

In dismissing S&R's petition to compel arbitration, the District Court explicitly gave consideration to the fact that Instituto had begun a lawsuit against S&R in Mexico (A239). This, too, was an error since such a lawsuit cannot bar arbitration where, as here, all the requirements of the Federal Arbitration Act are met. Its existence has no legal effect.

In Scherk v. Alberto-Culver Company, 417 U.S. 506, 516 (1974), the Court gave strong approval to arbitration in a pre-selected forum in international commercial disputes:

"A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction. Furthermore, such a provision obviates the danger that a dispute under the agreement might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area

involved ... [M]uch uncertainty and possible great inconvenience to both parties could arise if a suit could be maintained in any jurisdiction in which an accident might occur or if jurisdiction were left to any place [where personal or in rem jurisdiction might be established]. The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting." 417 U.S. at 520.

Accord, The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 13-14 (1972).

The purpose of the Green Coffee Association Contract, which calls for arbitration of disputes before a tribunal experienced in the international coffee trade, is to avoid the precise uncertainty recognized by the Supreme Court. In the language of Scherk, 417 U.S. at 517, it clearly would "imperil the willingness and ability" of S&R to do business around the world if it anticipated that it might be forced to litigate in the courts of Indonesia, Kenya, Tanzania, Burundi, Rwanda, Ethiopia, and Angola should a dispute arise with a coffee producer in any of these countries.

The Green Coffee Association Contract benefits Instituto as well as S&R. It protects both parties from the risks of unknown and unanticipated law, both substantive and

procedural. In this case the United States and Mexico may have sharply divergent rules of agency, conflict of laws, jurisdiction, discovery and the defense of payment. Here both parties contracted to avoid these risks by presenting their case to a panel skilled in the ways of international coffee distribution. This case is ideal for arbitration by such experts, since each party has claimed that the other was unfamiliar with certain trade practices and, as a result, made certain errors which caused the loss (A125-133, A225-226). Indeed, Instituto may have bound itself to the Green Coffee Association Contract precisely because at the time it perceived the benefit of arbitration in an international trade forum.

Finally, Judge Pierce erred in concluding that this dispute has more "contacts" with Mexico than with New York*.

Judge Pierce incorrectly stated that "most of the papers are in Spanish". There are as many (if not more) key papers in English. Judge Pierce noted that "only petitioner

*Even if it did, these "contacts" have absolutely no legal effect -- the District Court was not passing on a transfer motion under 28 U.S.C. §1404(a) -- but Judge Pierce obviously gave them some weight.

is truly present in New York" (A239). He fails to add that no officer or employee of S&R set foot in Mexico during this entire controversy. Instituto does maintain a New York office and it appears that fairly important officials are located there (A69). Judge Pierce's statement that "the coffee was shipped from Mexico, and payment was made in Mexico" (A239) ignores the obvious fact that the coffee was shipped to the United States and payment, as well as the purchase orders, was sent from the United States.

The key, of course, is not whether the courts of one country are more appropriate for this particular dispute than those of the other country, or whether one country's courts got "priority" because a suit was commenced there first. The key is that the parties made an agreement to arbitrate their disputes before a panel of experts perfectly suited to resolve such disputes. Arbitration is the fastest and least expensive way of resolving this controversy and the only way which will forestall ever-escalating litigation. Since S&R does not believe that the Mexican courts had jurisdiction over it and did not appear in the Mexican action (A230, A235-263), Instituto will undoubtedly take a default

judgment. It must then enforce that judgment in a New York court where jurisdictional defenses will further delay resolution of the only substantive issue -- who should bear the loss of approximately \$600,000. The dispute can be best resolved by the method the parties anticipated -- arbitration.

CONCLUSION

The judgment of the District Court must be reversed. This Court should order the parties to arbitration as a matter of law. If not, the case should be remanded to the District Court for a trial, as mandated by the Federal Arbitration Act, to decide whether the parties made an agreement to arbitrate.

Respectfully submitted,

PHILLIPS, NIZER, BENJAMIN,
KRIM & BALLON
Attorneys for Petitioner-
Appellant

Of Counsel:

Leonard S. Baum
George P. Birnbaum

Service of 2 copies of the
within Brief is hereby
admitted this 13th day of

August 1977
Signed Lellner, Danyuser + Bangs ^{By} Judy A. Bluestein
Attorney for Respondent - Appellee